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December 17, 1999

Magalie Roman Salas
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

VIA HAND DELIVERY

Re: CC Docket No. 96-45

Dear Ms. Salas:

Transmitted herewith, on behalf of NRTA and OPASTCO, are an original and four copies of comments in the above-referenced rulemaking proceeding. Diskette copies of the comments are also being hand delivered to Sheryl Todd at the FCC's Accounting Policy Division, as well as to the FCC's contractor, ITS, Inc.

In the event of any questions concerning this matter, please communicate with this office.

Very truly yours,

Margot Smiley Humphrey

Margot Smiley Humphrey

Enclosure

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Federal-State Joint Board on	)	
Universal Service:	)	CC Docket No. 96-45
Promoting Deployment and	)	
Subscribership in Unserved	)	
and Underserved Areas, Including	)	
Tribal and Insular Areas	)	

COMMENTS OF NRTA AND OPASTCO

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TABLE OF CONTENTS

Before the
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In the Matter of	)	
	)	
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COMMENTS OF NRTA AND OPASTCO

The National Rural Telecom Association (NRTA) and the Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO) submit these comments in response to the Further Notice of Proposed Rulemaking (FNPRM) in the above-captioned proceeding.[1] NRTA is an association of incumbent local exchange carriers (ILECs) that obtain financing under Rural Utilities Service (RUS) and Rural Telephone Bank (RTB) programs. OPASTCO is a trade association of over 500 independently owned and operated ILECs serving rural areas of the United States.

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[1] In the Matter of Federal-State Joint Board on Universal Service: Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas, , CC Docket No. 96-45, FCC 99-204 (rel. Sept. 3, 1999).

I. INTRODUCTION AND SUMMARY

NRTA and OPASTCO endorse the Commission's objective of increased service availability in unserved and underserved areas, including service to tribal lands and insular areas. Of course, the Commission must pursue its worthy objectives within the scope of the jurisdiction conferred on it by Congress, in compliance with the Communications Act and consistent with the needs of consumers.[2]

The Commission should not assume from low penetration rates that small and rural ILECs do not make service available to hard to serve areas such as reservations. The record will demonstrate that these wireline companies are often able to make service widely available and seek to modernize their networks even in remote, high cost and economically troubled areas, due to universal service support and RUS financing programs. Both programs require area-wide service. Low subscribership does not call into question the superior record of rural ILECs, but is more likely to indicate that tribal area economies and income levels are unusually low. Multiple supported carriers or new carriers and technologies are not the solution for areas where residents may not be able to afford or may not yet accord high value to subscribing to the public switched network.

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[2] Many of the issues raised in the FNPRM are already pending before the Commission in various other proceedings. To ensure a complete record for this proceeding and to avoid conflicting decisions, the Commission should consolidate all pending individual proceedings involving service to tribal areas, arguments about the Commission's jurisdiction under §214(e)(6) in tribal lands or over wireless carriers into this proceeding and decide them all as a matter of national policy. At the very least, it should incorporate the records in all such cases and consider them in formulating national policy here.

There are immediate steps for the Commission to take to remedy impediments to subscribership and investment in tribal and other high cost areas. Increased Lifeline and Link-Up support would directly address the needs of areas where incomes are unusually low. The advanced capabilities marketplace is in an early stage now and demand for residential high-speed Internet access is highly price-sensitive at present, but even when broadband has become more widely available elsewhere, the Commission will need to evolve the universal service definition if high cost areas are to benefit from reasonably comparable advanced services and prices. Support for Internet access where toll calling is necessary could also improve demand and use in remote areas. Prompt removal of both the "interim" cap on ILECs' transitional high cost support - which NECA expects to withhold nearly $133 million in necessary support under the current rules -- and the limitation on support for acquired high cost exchanges would also remove impediments to serving tribal and other high cost areas. The Commission should not directly or indirectly substitute some notion of a proper fund size for the Act's mandate for "sufficient" support. Nor can the Commission lawfully set a different universal service definition for tribal areas.

The Commission should decide the many unresolved issues concerning the obligations and privileges of incumbent and new ETCs, such as what lines served by a new ETC will qualify for support or cause the incumbent ILEC to forfeit per line support and what level of service customers will receive if a former ETC relinquishes that role. Such regulatory uncertainty impairs business decisions about investing or seeking ETC designation. The Commission should let ILECs use technologies and spectrum that can improve service to tribal and other high cost areas. Any extension of the exclusion of ILECs from LMDS license eligibility would simply maintain an impediment to the rural service availability the Commission wants to foster. And the Commission should not try to turn §214(e)(6), a narrow remedy for a possible impediment to state designation, into a tool for preempting state designations for tribal areas and wireless providers. Congress did not intend the provision to undermine its preference for state ETC designation authority for areas the states know best, which the 1996 Act enacted. While the Commission may favor ETC competition in all rural areas and may wish to consider competitive bidding for unserved areas, it should not forget that Congress left significant state discretion over ETC designations in rural carrier areas to preserve the public interest, since duplicative support in a rural market is not presumptively beneficial to consumers.

II. SMALL AND RURAL ILECs TYPICALLY PROVIDE SUPERIOR SERVICE TO THEIR RURAL SERVICE AREAS, INCLUDING TRIBAL AREAS

The Commission cannot generalize from subscribership statistics or facts about a few locations that all carriers provide the same level of service in tribal and high cost areas, let alone presume that this level of service is inadequate. Members of NRTA and OPASTCO provide service in most of the fifty states, including to tribal lands within their study areas. These small and rural companies take seriously their obligations as state-designated Eligible Telecommunications Carriers (ETCs) and carriers of last resort. They strive to provide high quality, evolving services and network capabilities to their customers. Indeed, a recent National Telephone Cooperative Association White Paper reports the combined results of a joint survey of its own and OPASTCO's responding members. The survey shows that Internet access is widely available to small and rural ILECs' customers and that these small and rural companies are deploying network advancements and making advances such as faster Internet access available to meet the nascent demand in tribal and other high cost, low volume areas.

As the White Paper demonstrates, the service that small and rural ILECs provide to tribal and other high cost, low density areas tends to be better than service provided by non-rural carriers. Since small and rural ILECs typically do not have large densely-populated cores in their service areas, their investment incentives are not directed towards more profitable markets. Yet, these carriers often achieve a higher level of subscribership than larger providers, even in tribal areas.[3] In tribal lands and many rural areas served by small and rural ILECs, low subscribership to a significant extent reflects economic problems and poverty, not lack of service availability.[4] Other problems include the unavailability of support for toll calling outside the isolated geographic areas and limited familiarity with service advances, which results in a much slower growth in demand.

It is the success of the national universal service support mechanisms and the RUS and RTB programs that has enabled these carriers, and many others like them, to provide and improve service to areas where low density goes hand in hand with higher than average costs of service. Indeed, RUS and RTB borrowers are held to the statutory purpose to "assure the

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[3] See National Telephone Cooperative Association, Dial-Tone is Not Enough: Serving Tribal Lands (November, 1999). For example, the Rural Telephone Coalition (RTC) has pointed out that within the part of the Crow Reservation served by Project Telephone Company, penetration is 71%. RTC Comments, CC Docket No. 96-45 and DA 99-1847, p. 17 (filed October 12, 1999).

[4] See, e.g., National Telecommunications And Information Administration, Falling Through The Net II: New Data On The Digital Divide, Section III, Highlights ("'Other non-Hispanic' households, including Native Americans, Asian Americans, and Eskimos, are least likely to have telephone service in rural areas (82.8%), particularly at low incomes (64.3%).")

availability of adequate telephone service to the widest practicable number of rural users of such service." In addition, the RUS Administrator has a statutory duty "insofar as possible, [to] obtain assurance that the telephone service to be furnished or approved ... [with the financing] ... will be made available to the widest practical number of rural users."[5] Moreover, as the Commission recognized in its recent inputs decision for its non-rural carrier cost proxy model, RUS-financed deployment must meet RUS engineering standards.[6] The same order, in contrast, found that non-rural carriers tend to have lower book costs in their rural service territory, which the Commission concluded

> may suggest that these areas are served by networks of a different quality standard than that assumed in the model, or that the networks in these areas have not been upgraded or experienced much growth in some time and therefore are substantially depreciated on carriers' books.[7]

NRTA and OPASTCO's members look forward to continuing in their role as universal service providers and would welcome effective Commission universal service policies that will address the factors that cause low subscribership or inability to provide service in some parts of the country, even with current support programs. However, the Commission should not conclude or presume that lower subscribership on tribal lands indicates that the current ILEC ETCs cannot make available the technology or the services that these communities need and should have available under the policies enacted by §254 of the Telecommunications Act of 1996 (the 1996

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[5] 7 U.S.C. §§921, 922.

[6] Federal-State Joint Board on Universal Service; Forward-Looking Mechanism for High Cost Support for Non-Rural LECs, Tenth Report and Order, CC Docket Nos. 96-45, 97-160, ¶117 (rel. Nov. 2, 1999) (Inputs Order).

[7] Inputs Order at ¶27.

Act). The Commission is wise to probe the causes of low subscribership in some areas and why service is unavailable in others, but it should be careful not to confuse the two. The problem in areas with low telephone penetration can be addressed with support to make the service more affordable to those customers and information about the benefits of participating in the nationwide public switched network. The different problem in areas where no carrier has yet found service economically feasible is market failure that can best be addressed with improved high cost support. Certainly, squandering support on multiple networks would not be an efficient answer to providing or improving service availability or subscribership in a market that is too thin and too economically troubled to support even a single carrier. Thus, the Commission should resist the temptation evident in the FNPRM to rewrite the Communications Act and seize jurisdiction from the states to stimulate competition among ETCs in even the thinnest markets or to favor support for different technologies and carriers it apparently assumes will cure the problem of low subscribership.

III. THE COMMISSION SHOULD REMEDY EXISTING IMPEDIMENTS TO UNIVERSAL SUBSCRIBERSHIP AND INVESTMENT IN TRIBAL AND OTHER HIGH COST AREAS

A. Expanding Lifeline and Link-Up Support Could Increase Subscribership Where Ailing Economies and Extensive Poverty Cause Low Penetration

Since low income correlates closely with below average subscribership in tribal and high cost rural areas,[8] increasing Lifeline and Link-Up support for areas with unusually low

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[8] NTIA reports (Section III) that: "Those living in rural areas at the lowest income levels are among the least connected. Rural households earning less than $5,000 per year have the lowest <u>telephone</u> penetration rates (74.4%) ... Rural households earning between $5,000-$10,000 have the lowest <u>PC</u>-ownership rates (7.9%) and <u>on-line access</u> rates (2.3%) ...."

subscribership is the most reasonable and targeted approach to the problem of making basic telephone service more affordable to reservations and tribal lands. Where remoteness and extremely low density require long loops at exceptionally high cost, increased, "sufficient" Link-Up support may allow currently unconnected consumers to subscribe. This is particularly true in those rural ILEC areas where subscribership is below average even when service is available at generally affordable and reasonably comparable rates.

B. Rural Deployment of Advanced Capabilities and Services Will Require Evolving the Definition of Universal Services Eligible for High Cost Support

The problem of ensuring the deployment of advanced network capabilities in rural areas is not restricted to tribal or insular areas. The high cost of deployment and the lack of demand for fast Internet access, for example, at monthly rates over $25,[9] indicates that the Commission should keep pursuing this goal as a rural and high cost market problem, applying the standards of §254(c)(1) for evolving the definition of universal service as new capabilities and services become widespread in non-rural areas.[10] For tribal and other remote areas, the Commission should also encourage the use of the school and health care discounts available under §254(h).

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[9] See "Cable High-Speed Internet Can Expect Competitive Challenge by 2002," Strategis Group press release announcing publication of "High-Speed Internet: Demand, Technology, and Strategy," 12/21/98 (available online at http://www.strategisgroup.com/press/pubs/hsi2.html as of 12/07/99).

[10] Section 254(c)(1) provides, in part, for an evolving definition of universal service, suggesting that: "The Joint Board in recommending, and the Commission in establishing, the definition of the services that are supported by Federal universal service support mechanisms shall consider the extent to which such telecommunications services -- (A) are essential to education, public health, or public safety; (B) have, through the operation of market choices by customers, been subscribed to by a substantial majority of residential customers; (C) are being deployed in public telecommunications networks by telecommunications carriers; and (D) are consistent with the public interest, convenience, and necessity.

C. The Commission Should Remove the Cap on Rural Carriers' Transitional Support and Repeal the Limit on Support for Acquired Exchanges

The high cost of service in rural and remote areas, including tribal and insular areas, requires the "sufficient" support mandated by Congress in §254. However, the Commission currently has two caps in effect which ensure that support will not be "sufficient," even in the locations most in need of support. The "interim" cap on high cost loop support is a real and significant impediment to support for tribal and other high cost areas. After the transition support mechanism for rural carriers computes what support is necessary under the program that has done well in promoting universal service in high cost areas, the cap intervenes to make some of that necessary support unavailable. NECA expects the level of necessary support that will be unavailable in 2000 because of the cap and will be spread over all loop support recipients -- including those in rural and insular areas and other areas with low subscribership served by rural carriers -- to be nearly $133 million. The Commission cannot accomplish its duty to ensure nationwide universal service and advanced network capabilities while it insists that support growth must be strictly limited. The statutory requirement for "sufficient" support requires the Commission to demonstrate that any limits it places on support, whether via a direct and explicit cap or implicit rulemaking goals, do not frustrate the statutory mandate.

The second "cap" applies when a rural carrier acquires one or more exchanges from a non-rural ILEC. Such sales have been increasing in recent years as the largest incumbents seek to sell off high cost rural portions of their service territory. These sold exchanges frequently do not have the high quality service that rural ILECs typically provide to their customers and sometimes include tribal lands. Often, the acquiring rural ILEC plans to modernize the acquired exchange. Nevertheless, in spite of the Commission's commitment to areas where subscribership is low or service is not available ubiquitously, the Commission's rules limit support for these exchanges and their customers to the amount received by the selling carrier.

The victims of both of these "caps" are the customers in high cost areas for whom Congress intended "sufficient" support to ensure that rates and services are reasonably comparable to those available to urban customers. The Commission should eliminate the interim cap and the rule restricting support to acquired exchanges.

D. The Commission Should Decide Open Issues that Prevent Informed Decisions about Serving Tribal and Other High Cost Areas

The Commission should act quickly to resolve the many open issues that cause uncertainty for ILECs and others that may want to be designated as additional ETCs for some part or all of their service areas. The Commission has not answered questions yet about how its rules on support portability will work. For example, it is not clear how competing ETCs will ascertain whether a line is "captured" from another ETC -- which will determine whether the previous provider of the line will lose support for that line -- or is a "new" line, or even what lines provided by a new ETC will qualify for support. Unwarranted loss of support by incumbent ETCs would jeopardize service to their highest cost customers and discourage ILEC and competing carriers from making rural infrastructure investment decisions that the FCC and Congress want to encourage.

Another crucial problem that is unresolved with respect to support that is portable to competing ETCs in rural ILECs' study areas is the need for disaggregation of averaged study area support to reflect the cost differences within a service area. The Commission's failure to provide for disaggregation for these rural markets poses threats for the sufficiency of support for the higher cost customers that an ILEC may be left to serve when another ETC targets its lower cost customers: The new ETC would get windfall average support to serve below average cost lines, while the rural ILEC would have to serve above average cost lines while getting only averaged support per line.

The Commission or the states must also determine what obligations new ETCs will have, including how customers can continue to receive adequate service if wireless providers become ETCs and are subsequently left solely responsible for universal service if the former ETC relinquishes its position as an ETC under §214(e)(4). That concern is not answered by designation as an ETC, since wireless providers maintain that their rates cannot be regulated and they need not provide equal access to competing interexchange carriers. The Commission should also decide what constitutes required "free" air time or local usage for wireless carriers. Unanswered questions are an impediment for both ILECs and competing carriers that want to be designated as ETCs. An incumbent ETC cannot determine whether further investment is feasible if it cannot estimate the customer revenues and support that it may lose before it recovers its investment. A would-be ETC cannot make an informed business judgment about seeking designation and undertaking the accompanying responsibilities while the nature of those responsibilities remains a mystery.

The concern about unanswered questions is also relevant to the Commission's suggestion that a different definition of universal service might apply to tribal lands. Section 254 prescribes the way that federally supported services must be defined, and does not provide the Commission with authority to apply a lower, higher or different list to tribal areas. Indeed, §254(c)(3) of the statute expressly provides for authority to use a different list only for the institutions covered by the special provisions of §254(h). In any event, ETCs should know what their responsibilities will entail, especially those that are already-designated incumbent ETCs and may not have the option of relinquishing that status even if the definition and conditions of service change.

E. Support for Internet Access Where Toll Calling is Required Would Increase Affordable Access to Information

While Internet access is available as a local service in many high cost areas served by rural ILECs, there are still places where the cost and the likely revenues from a small customer base mean that Internet access requires the expense of toll calling. For isolated high cost tribal areas and other remote locations where this is the case, the Commission should define local Internet access as a component of universal service and provide support to make local Internet access affordable.

F. The Commission Should Not Deny Existing ETCs the Use of Technologies and Spectrum that Could Efficiently Extend the Availability of Affordable Service

The Commission is well aware of the benefits of wireless technology for remote, rural areas, as evidenced by its companion NPRM seeking comment on the potential of wireless technology to provide basic telephone service to tribal lands.[11] In order to provide advanced wireless-based services to rural customers, however, small carriers, including small ILECs, need the ability to acquire the necessary spectrum, unfettered by regulatory restrictions. This Commission has already taken a step in the right direction by raising the Commercial Mobile

[11] Extending Wireless Service to Tribal Lands, Notice of Proposed Rulemaking, WT Docket No. 99-266, FCC 99-205, (rel. Aug. 18, 1999).

Radio Service (CMRS) spectrum cap in Rural Service Areas (RSAs) from 45 to 55 MHz in the hope that it will help to facilitate the deployment of Personal Communications Service (PCS). The Commission correctly found that the spectrum cap could be raised in rural areas without significant risk to competition.[12]

Unfortunately, an earlier Commission decision did not demonstrate the same foresight. It concluded that competition would be promoted by effectively barring small ILECs from providing Local Multipoint Distribution Service (LMDS) in their service areas.[13] By restricting the companies most likely to provide LMDS in less sought after rural areas, the Commission's decision severely diminished the opportunities for these subscribers to receive timely access to this new broadband technology.

Clearly, the most effective way to ensure that rural areas receive LMDS, or any other spectrum-based service, is to encourage, rather than prohibit, rural ILECs' participation. The Commission's concerns about spectrum warehousing are simply not applicable to small ILECs. These companies have demonstrated a historical commitment to providing high quality, modern

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[12] 1998 Biennial Regulatory Review Spectrum Aggregation Limits for Wireless Telecommunications Carriers, WT Docket No. 98-205, Cellular Telecommunications Industry Association's Petition for Forbearance From the 45 MHz CMRS Spectrum Cap, Amendment of Parts 20 and 24 of the Commission's Rules - Broadband PCS Competitive Bidding and Commercial Mobile Radio Service Spectrum Cap, WT Docket No. 96-59, Implementation of Sections 3(n) and 332 of the Communications Act, GN Docket No. 93-252, Regulatory Treatment of Mobile Services, FCC 99-244, (rel. Sept. 22, 1999), para. 84.

[13] Rulemaking To Amend Parts 1, 2, 21, and 25 Of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, To Reallocate the 29.5-30.0 GHz Frequency Band, To Establish Rules and Policies for Local Multipoint Distribution Service And for Fixed Satellite Services, et. al., Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking, CC Docket No. 92-297, FCC 97-82, (rel. Mar. 13, 1997), para. 162.

telecommunications service to their rural service areas, which had historically been passed over by other carriers. It is unfathomable that a small ILEC would tie up vast amounts of capital on spectrum only to retard the delivery of service in the hope that this strategy would deter a potential competitor from entering the market.

On December 13, 1999, the Commission released a Notice of Proposed Rulemaking seeking comment on whether the LMDS eligibility restrictions should be allowed to sunset on June 30, 2000, as scheduled, or should be extended.[14] It is noteworthy that two Commissioners dissented from its issuance, stating that the Commission should have simply allowed the short-term restrictions to sunset as scheduled.[15] Clearly, extending the eligibility restrictions on rural ILECs would only further delay the deployment of this important technology to rural markets. Therefore, following the comment cycle of the LMDS NPRM, the Commission should, at the very least, promptly remove the restrictions for rural ILECs. This would permit these carriers to use LMDS, in conjunction with other technologies, to further the universal service goal of comparable access in rural areas, including those areas that are unserved and underserved.[16]

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[14] Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5 - 29.5 GHz Frequency Band, to Reallocate the 29.5 - 30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, Sixth Notice of Proposed Rulemaking, CC Docket No. 92-297, FCC 99-379, (Rel. Dec. 13, 1999). (LMDS NPRM).

[15] LMDS NPRM, *See*, Dissenting Statement of Commissioner Harold Furchtgott-Roth and Dissenting Statement of Commissioner Michael Powell.

[16] Commissioner Furchtgott-Roth notes that "LMDS may be a logical service to use in 'filling in' underserved areas for existing providers." *See*, LMDS NPRM, Dissenting Statement of Harold Furchtgott-Roth, p. 3.

IV. CONGRESS ADOPTED SECTION 214(e)(6) AS A TECHNICAL AMENDMENT TO REMEDY STATE INABILITY TO DESIGNATE TRIBALLY-OWNED CARRIERS AS ETCs, NOT AN INVITATION FOR SWEEPING COMMISSION PREEMPTION

The 1996 Act reserves to the states the general authority to designate ETCs under a standard that distinguishes between requests for designation in larger ILECs' service areas or areas served by statutorily defined rural telephone companies.[17] Section 214(e)(2) directs the states to designate more than one requesting ETC in the larger ILEC areas, but requires a state public interest determination before an additional designation can be granted in an area served by a rural telephone company. The state is the logical choice to make these decisions because states have greater knowledge about their rural areas, and much federal high cost support is designed to keep local rates affordable.[18]

The Commission had actually ruled that carriers not subject to the full force of state regulation, such as wireless carriers and tribally-owned companies, could nevertheless be designated as ETCs under the law.[19] However, representatives of tribally-owned telephone

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[17] 47 U.S.C. §214(e)(2).

[18] Federal-State Joint Board on Universal Service, Ninth Report & Order and Eighteenth Order on Reconsideration, FCC 99-306, CC Docket No. 96-45, ¶113 (rel. Nov. 2, 1999):

> We re-emphasize that the support provided through the methodology described in this Order will be used to enable the reasonable comparability of *intrastate* rates, and thus will not be used to replace implicit support in interstate access rates. (Emphasis in the original).

[19] Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Notice of Proposed Rulemaking and Order Establishing Joint Board, 11 FCC Rcd 18092, ¶147 (1996) (May 8 Order):

> We note that not all carriers are subject to the jurisdiction of a state commission. Nothing in section 214(e)(1), however, requires that a carrier be subject to the jurisdiction of a state commission in order to be designated an eligible

companies whose state Commissions lacked regulatory authority over them owing to their sovereign status persuaded Congress to adopt what was, in effect, a "belt and suspenders" amendment to ensure that their study areas would not lose their support because of the lack of state jurisdiction.

This limited intent of the resulting provision, §214(e)(6), is apparent from the language and the legislative history of the amendment. The statute provides for Commission authority to designate a carrier an ETC "[i]n the case of a common carrier ... that is not subject to the jurisdiction of a State commission" and requires the Commission to make the same public interest finding as the states before designating another ETC in an area served by a rural telephone company.

Senate floor colloquy between co-sponsoring Senators McCain and Daschle explained that states typically have no jurisdiction over "tribally owned companies," but expressly stated that the amendment "does nothing to alter the existing jurisdiction that state commissions already have over local exchange carriers or providers of commercial mobile radio services as set forth in Section 332(c)(3) of the Telecommunications Act."[20] A House floor statement by Representative Hayworth explained that the amendment "corrects a technical glitch in section 214(e)" because a lack of state jurisdiction over "a tribal-owned carrier" could prevent designation of such a carrier although it "is a traditional incumbent local exchange carrier that provides the core universal

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> telecommunications carrier. Thus tribal telephone companies, CMRS providers, and other carriers not subject to the full panoply of state regulation may still be designated as eligible telecommunications carriers (footnote omitted).

[20] November 13, 1997 Cong. Rec. S12568. See also H10808-09.

services, ... [has] previously received Federal universal support or ... will be deemed a carrier of last resort to serve every customer in their service area." He supported the legislation so "these entities can continue to serve their customers as eligible carriers."[21]

The Commission's suggestion that it may take jurisdiction over non-tribal providers' service on tribal lands, identified under various legal standards, and over all wireless carriers, including CMRS systems, would give sweeping effect to the legislation that its sponsors expressly disclaimed and would seize jurisdiction from the states in areas served by carriers that are subject to state jurisdiction and have even received state ETC designations. It would also wipe out the jurisdiction "states already have" over CMRS providers under §332(c)(3), despite the express statements of chief Senate sponsors that the amendment would not have that effect.

Section 332(c) does not require preemption of ETC designation jurisdiction. It preempts state jurisdiction over rates and entry for providers of "mobile" services. But it preserves state authority over other "terms and conditions" of service, which include ETC designation, since designation is not rate or entry regulation. CMRS providers are free to serve throughout the service areas for which they hold federal licenses, regardless of whether they qualify as ETCs. Moreover, CMRS providers have sought and obtained state ETC designations. For example, Minnesota has granted a CMRS provider ETC status. The CMRS provider argued there that the state has authority to designate it as an ETC[22] and assured the state that it would limit its rates.[23]

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[21] Representative Markey also referred on the same day in the House debate to "finetuning" the 1996 Act for carriers that are "not subject to the jurisdiction of a State commission, including those telephone companies owned by certain federally-recognized Indian tribes ..."

[22] See Minnesota Public Utilities Commission Staff Briefing Papers, prepared for meeting on September 29, 1999, p. 8, which reports, citing the CMRS provider's brief, that

In addition, §332(c) retains non-discriminatory state universal service authority when CMRS services are a substitute for a significant share of the wireline service in a state, which must necessarily be the intent and effect of a CMRS provider's requesting and obtaining universal service provider status in an area or, as some CMRS carriers have requested, throughout a state.

Consequently, the Commission should abandon the notion of wresting jurisdiction from the states because it wants to control the choice of providers in tribal lands and perhaps even for all wireless providers. Congress resolved that issue in favor of the states in the language of the statute and the legislative history of §214(e)(6), with the narrow exception of tribally-owned carriers whose sovereignty is actually asserted to preclude state jurisdiction to designate them as ETCs.

The Commission should at least follow its proposed policy of considering requests to assume federal jurisdiction for ETC designation only where a state disclaims jurisdiction or a tribal authority disputes a state's assertion of jurisdiction. The Commission was correct in the first place in the May 8 Order that the statute permits designation as an ETC even though a CMRS provider or tribal area is not fully subject to state regulatory jurisdiction. It should not try to supplant the state role for wireless carrier designations or for all tribal lands. Above all, the Commission should not allow carriers who fear that a state will not designate them as ETCs to

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"MCC [the CMRS provider] notes that state commissions are clearly authorized under the Telecommunications Act of 1996 to designate common carriers as ETCs," have used this authority "to designate incumbent LECs as ETCs" and must exercise its authority to designate MCC because not so doing "would be discriminatory treatment of wireless telephone service providers that violates the Act."

[23] Id., at 3, reporting that "MCC commits to price the package at +/- 10 percent of the incumbent LEC's local rates."

forum-shop, let alone to demand Commission review of a state's jurisdictional or substantive decisions.

V. THE COMMISSION SHOULD RECOGNIZE THAT SPURRING COMPETITIVE ETC DESIGNATIONS IN RURAL ILECS' STUDY AREAS IS LIKELY TO RAISE THE COST OF UNIVERSAL SERVICE AND IMPEDE DEPLOYMENT OF INFRASTRUCTURE AND ADVANCED SERVICES

As noted above, Congress required that states make a public interest finding before adding another ETC in an area served by a rural ILEC. Its action demonstrates its awareness that competition and duplicative support cannot be assumed to serve the public interest in these areas that small and rural carriers typically undertook to serve because larger companies had not done so.

The Commission seems to recognize this economic fact when it asks whether it can and should use competitive bidding to select an exclusive provider for an unserved area. It is clear from the statute that the Commission and the states have that authority for services subject to their jurisdiction. Section 214(e)(4) speaks of deciding which "carrier or carriers" can best serve the area, so plainly a single carrier designation is permissible. Where an area has not been served by an existing carrier because the provision of service is not economically feasible even with existing support mechanisms, a determination that two carriers and dual support is necessary would impede efficiency and saddle the support system and the nation's ratepayers with higher costs than necessary. In a market that has proved incapable of sustaining even one carrier with available support, an exclusive ETC designation would also best provide the incentive to invest in network improvements that would enable customers to obtain advanced services with some confidence that costs could be recovered despite the difficulty of the market to serve.

Although the Commission may wish to investigate the use of competitive bidding for unserved areas within its jurisdiction, which §214(e)(4) limits to interstate services, it cannot lawfully substitute competitive bidding for the two-fold statutory standard for ETC designation in areas already served by rural or non-rural telephone companies. Particularly if service is available at reasonable rates, the Commission cannot treat the area as unserved (or "underserved") because subscribership is low. And in a rural ILEC's study area, it cannot substitute competitive bidding for the statutory mandate that another ETC can only be named on the basis of a determination that it will be in the public interest to do so.

While choosing a single carrier may be the most economically efficient approach, that does not necessarily mean that competitive bidding that designates the low bidder is the most publicly beneficial result. The Commission must be careful to avoid the danger of creating the incentive to provide second class or worse service in order to arrive at the lowest bid. Quality of service cannot be assumed to be the outcome of competitive bidding in a market where support is needed to avoid market failure and there are inadequate incentives for the "reasonably comparable" service Congress intends in high cost rural areas.

VI. CONCLUSION

Therefore, the Commission should vigorously pursue its goal of improving service availability and subscribership in tribal lands and other high cost areas. This can be accomplished by adding to Lifeline and Link-Up Support where penetration is unusually low, evolving the definition of universal service at the appropriate point in market development and providing support for Internet access that requires toll calling. The Commission should also quickly remove obstacles to ILEC service and investment, including the interim cap on high cost loop support, limits on support for acquired exchanges and ILEC access to technologies and spectrum and decide open questions that impair carriers' decisions about investment and seeking ETC designation. It should, however, refrain from sweeping preemption of state ETC designation authority for tribal lands or CMRS providers and, instead, interpret §214(e)(6) narrowly, as it is written and as Congress intended.

Respectfully submitted,

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December 17, 1999

CERTIFICATE OF SERVICE

I, Victoria C. Kim, of Koteen & Naftalin, hereby certify that true copies of the foregoing NRTA/OPASTCO's Comments on the rulemaking proceeding, CC Docket No. 96-45, have been served on the parties listed below, via first class mail, postage prepaid on the 17th day of December 1999.

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